STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2010
v	No. 291432 Jackson Circuit Court
JOSHUA EMMANUEL MCDOWELL, Defendant-Appellant.	LC No. 07-004907-FC

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

James McCulley was working as a cook at Kentucky Fried Chicken (KFC) on November 11, 2007, and was assigned to close the restaurant, along with the manager, David Walker. The restaurant closed at 10:30 p.m., but McCulley waited at the restaurant for Walker to give him a ride home. At approximately 1:00 a.m., McCulley was in the parking lot waiting for Walker when defendant appeared, pulled a gun, and told McCulley to go back inside. They went in through the employee door, and defendant told McCulley to take him to the office, or defendant would kill him. Defendant then demanded money from Walker, who was in the office, and Walker gave defendant the money from the safe. Defendant told Walker and McCulley to go to the freezer. They did so, and defendant locked them inside and left. Walker called the police on his cell phone, and he and McCulley were eventually set free.

Although the robber was wearing a bandana over the lower half of his face, McCulley identified defendant as the person who robbed the restaurant. Walker also identified defendant as the robber. Walker stated that he was finishing his reports when he heard the door chime as McCulley reentered the restaurant. He then heard defendant demand all the money. Walker turned around and saw defendant standing with his gun pointed at McCulley. Walker testified that he was "100 percent sure" that the voice of the robber was defendant's. He also testified that he knew defendant because defendant was an acquaintance of O.C. Smith and Latoya Hodge, two former employees, and defendant frequented the restaurant. Walker had seen defendant in the restaurant two or three times a week for months. Defendant took $7,138.

Smith testified that he was testifying in return for a plea agreement. He stated that he met defendant at a halfway house in Jackson, Michigan, and that he had worked with defendant at the KFC.[1] Smith further testified that he had previously spoken with defendant about how easy it would be to rob the KFC. They continued to talk about it after defendant was no longer employed at the KFC. Smith testified that he sold defendant a handgun on the Friday before the robbery. Later that day, defendant asked Smith if the KFC still did not have security cameras and if the safe was still in the same spot. On Sunday, defendant came to Smith's house and the two again spoke about the robbery. Smith agreed to go with defendant to the restaurant, and they arrived at approximately 11:50 p.m. Defendant left the car when he saw McCulley come out, and Smith saw defendant walk McCulley back into the building. Smith stated that defendant came running out approximately five minutes later, carrying a bag of money. Defendant was nervous because he thought Walker had recognized his voice. Defendant gave Smith approximately $3,000 from the robbery.

Defendant's acquaintance, Amina Ali, testified that defendant admitted that he "did the KFC thing," and that she believed defendant meant he had committed the robbery. She also testified that on November 12, 2007, defendant called and told her he was leaving town. He asked her if her girls needed anything, and she asked him if he needed any money. He told her that he had $7,000. Ali testified that defendant had, up until recently, been working at a restaurant making approximately $400 a week.

Defendant denied committing the robbery and telling Ali that he did so, although he admitted that he told her his "pockets [were] heavy." He testified that he had worked at KFC, but that his most recent job was as a dishwasher at Hudson's Bar and Grill. He became unemployed at the end of October or the beginning of November 2007. Defendant also admitted during cross-examination that he had learned that his girlfriend was pregnant a short time prior to November 11, 2007.

On appeal, defendant argues that the trial court erred when it permitted the prosecution to present evidence of his unemployment to prove that he had a motive for the robbery. Defendant admits that he did not preserve this claim of error.

We review unpreserved claims for plain error affecting a defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To avoid forfeiture under the plain error rule: (1) the error must have occurred; (2) the error must have been plain, meaning clear or obvious; (3) and the plain error had to prejudice the defendant by affecting the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). However, even when we find plain error, we will reverse only when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of a defendant's innocence, or where the error resulted in an actually innocent defendant's conviction. *Id*.

Defendant has not shown that he is entitled to relief based on the introduction of evidence of his recent unemployment.

[1] Defendant worked at the restaurant for approximately one month in 2006.

Defendant correctly notes that generally, "[e]vidence of poverty, dependence on welfare or unemployment is not admissible to show motive or as evidence of a witness's credibility." *People v Conte*, 152 Mich App 8, 14; 391 NW2d 763 (1986). See also *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980). The probative value of such evidence is low because it applies to too large a segment of the total population, and its prejudicial impact is high because "[t]here is a risk that it will cause jurors to view a defendant as a 'bad man'—a poor provider, a worthless individual." *Id*. But, "[o]ther evidence of financial condition may, however, be admissible in the circumstance of a particular case" *Id*. As discussed in *Henderson*:

> There is a difference between evidence of poverty and unemployment—evidence that a person is chronically short of funds—and evidence of the sort involved in this appeal, showing that a person is experiencing a shortage of funds that appears to be novel or contrary to what one would expect is typically felt by such a person. [*Id*.]

See also *Smith v Mich Basic Prop Ins Ass'n*, 441 Mich 181, 192-195; 490 NW2d 864 (1992) (discussing the difference between impermissible evidence of poverty and permissible evidence of a deterioration in financial condition). Here, the prosecution did not seek to use defendant's unemployment status alone as motive for the crime, or to show that defendant was an otherwise "worthless individual." Instead, the prosecution sought to couple defendant's recent unemployment with the recent knowledge of his girlfriend's pregnancy to show a "novel" deterioration in his financial status. The prosecution also used the evidence of defendant's recent employment history to show that his statement to Ali the day after the robbery that he had an extra $7000 was also unusual given his financial status. Given the prosecution's use of this employment evidence, we are not convinced that the trial court erred in admitting it at trial.

Moreover, even if any error had occurred, reversal would not be warranted. The prosecution presented strong evidence of defendant's guilt. Both McCulley and Walker identified defendant as the robber. In particular, Walker was "100 percent" certain that the robber's voice was that of defendant, and also testified that he had repeatedly seen and heard defendant at the KFC for months prior to the robbery. Defendant's accomplice also positively identified him as a participant in the robbery, detailed the planning of the robbery and defendant's part in it, and stated that defendant went into the restaurant with McCulley after laying in wait outside for him. Ali, a woman defendant described as "like a mother" to him, and who admitted that she loved defendant like a child, testified that defendant confessed to her that he had robbed the restaurant. She also testified that defendant called her the day after the robbery and told her that he had $7,000, which was approximately the amount of money taken in the robbery. Taken together, this evidence renders any alleged error in the admission of defendant's employment status harmless. Defendant cannot show that he is entitled to relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering